No. 17-1042

IN THE
Supreme Court of the United States

BNSF RAILWAY COMPANY,
Petitioner,

v.

MICHAEL D. LOOS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

REPLY BRIEF FOR PETITIONER

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TABLE OF CONTENTS

Page

Table of Authorities ii

Reply 1

I. RRTA "Compensation" Encompasses Pay for Time Lost 2

A. Traditional Interpretive Tools Confirm that Pay for Time Lost is Taxable 2

1. Text 2

2. Structure 8

3. History and Purpose 12

B. The RRTA Does Not Distinguish Between Judgments and Settlements 16

C. The IRS's Interpretation Warrants *Chevron* Deference 18

II. Section 104(a)(2) Does Not Apply 19

Conclusion 25

TABLE OF AUTHORITIES

Cases Page(s)

Auer v. Robbins,
519 U.S. 452 (1997) 19

Barnhart v. Walton,
535 U.S. 212 (2002) 24

Christopher v. SmithKline Beecham Corp.,
567 U.S. 142 (2012) 19

Encino Motorcars, LLC v. Navarro,
138 S. Ct. 1134 (2018) 15

Envtl. Def. v. Duke Energy Corp.,
549 U.S. 561 (2007) 23

Epsilon Elecs., Inc. v. U.S. Dep't of Treasury, Office of Foreign Assets Control,
857 F.3d 913 (D.C. Cir. 2017) 9

Hawaiian Airlines, Inc. v. Norris,
512 U.S. 246 (1994) 10

Hilton v. S.C. Pub. Railways Comm'n,
502 U.S. 197 (1991) 3

Kelley v. S. Pac. Co.,
419 U.S. 318 (1974) 3

Liberatore v. Monongahela Ry. Co.,
140 A.3d 16 (Pa. Super. Ct. 2016) 15

Lifetime Siding, Inc. v. United States,
359 F.2d 657 (2d Cir. 1966) 7

McNally v. United States,
483 U.S. 350 (1987) 10

Mead Corp. v. Tilley,
490 U.S. 714 (1989) 11

Montello Salt Co. v. Utah,
221 U.S. 452 (1911) 9

Cases—Continued Page(s)

Munoz v. Norfolk S. Ry. Co.,
2018 WL 2728696 (Ill. App. Ct. June 5, 2018) 15

NLRB v. Bell Aerospace Co.,
416 U.S. 267 (1974) 24

Overstreet v. N. Shore Corp.,
318 U.S. 125 (1943) 11

Phillips v. Chi. Cent. & Pac. R.R. Co.,
853 N.W.2d 636 (Iowa 2014) 10, 11, 12

Rowan Cos. v. United States,
452 U.S. 247 (1981) 23, 24

Schreiber v. Burlington N., Inc.,
472 U.S. 1 (1985) 10

Soc. Sec. Bd. v. Nierotko,
327 U.S. 358 (1946) 5, 12, 16

United States v. Cleveland Indians Baseball Co.,
532 U.S. 200 (2001) 5, 6, 10, 11

United States v. Mead Corp.,
533 U.S. 218 (2001) 24

United States v. Quality Stores, Inc.,
134 S. Ct. 1395 (2014) 4, 5, 6, 8

Universal Carloading & Distrib. Co. v. Pedrick,
184 F.2d 64 (2d Cir. 1950) 11

Statutes

26 U.S.C.
§ 61 20
§§ 101-140 22
§ 104 24
§ 104(a)(2) 19, 20, 22, 24
§ 108(f)(4) 22
§ 117 22
§ 125 22
§ 129 22

Statutes—Continued Page(s)

26 U.S.C. (cont.)
§ 137 22
§ 1500(a) (1946) 21
§ 3101 23
§ 3121(a) 24
§ 3121(b) 7
§ 3121(d)(2) 7
§ 3121(e)(1) 12
§ 3201 ..... 20, 21, 22, 23
§ 3201(a) 20
§ 3211 13
§ 3221 ..... 20, 21, 22
§ 3231(e) ..... *passim*
§ 3231(e)(1) 8, 24
§ 3231(e)(2) 19
§ 3231(e)(3) 22
§ 3231(e)(4) 8
§ 3231(e)(5) 22
§ 3402(a) 23
§ 6051(e)(1) 21
45 U.S.C.
§ 55 3
§ 231(a) 11
§ 231(b) 9
§ 231(f)(1) 10
§ 231(h) 9, 10
§ 231b(i)(2) 10
§ 231e(e)(2) 21
§ 231n(a) 12
§ 231n(b) 12
§ 362(*o*) 17
Act of July 31, 1946
Pub. L. 79-572 § 2, 60 Stat. 722 18

Statutes—Continued Page(s)

Carriers Taxing Act of 1937
§ 1(e), 50 Stat. 436 8

Executive Materials

26 C.F.R.
§ 31.3121(d)-1(c)(2) 7
§ 31.3231(e)-1(a)(1) 23
§ 31.3231(e)-1(a)(3) 18
§ 31.3231(e)-1(a)(4) 18
§ 410.5 (1938) 18

IRS Technical Advice Memorandum 8115012, 1980 WL 137627 (1980) 17, 19, 24

RRB, Pay for Time Lost from Regular Railroad Employment (2017) 17

U.S. Treasury Dep't, Bureau of Internal Revenue, Regulations 100 Relating to Employers' Tax Employees' Tax, and Employee Representatives' Tax Under the Carriers Taxing Act of 1937 (1937) 8, 17

Legislative Materials

92 Cong. Rec. (July 26, 1946)
p. 10,132 11
p. 10,160 11

S. Rep. No. 75-818 (1937) 8

S. Rep. No. 79-1710 (1946) 5, 18

Other Authorities

Black's Law Dictionary 7

Schreiber, *The Legislative History of the Railroad Retirement and Railroad Unemployment Insurance Systems* (1978) 12, 14

REPLY

Respondent received a FELA award for "past *wage* loss." JA94a (emphasis added). It is called that for a reason: because the payment constitutes compensation for services rendered to BNSF, compensation to which respondent is entitled because of his employee-employer relationship with BNSF. Respondent tellingly does not defend the Eighth Circuit's holding that "services rendered" includes only pay for hours "actually" worked. Pet. App. 20a. Instead, respondent invents a special, this-case-only rule: compensation for "services rendered" *does* include compensation for hours *not* worked, but not if "negligence" is involved.

This is the first in a litany of arguments respondent throws up in the hopes that one will excuse him from paying employment taxes on his lost wages award. Respondent argues that a backpay award is not compensation for services rendered; but even if backpay is compensation, the RRTA taxes backpay only from settlements, not from judgments; but even if the RRTA taxes backpay judgments, only employers pay taxes, not employees. Each of these arguments runs headlong into the statutory text, this Court's precedents, 80 years of unbroken IRS guidance, and common sense. Employees receive credit for FELA backpay awards for purposes of the retirement annuity they earn on account of their service to the railroads, and respondent offers no conceivable reason why Congress would allow employees to reap the corollary retirement benefits without paying the corresponding taxes.

I. RRTA "Compensation" Encompasses Pay for Time Lost

A. Traditional Interpretive Tools Confirm that Pay for Time Lost is Taxable

1. Text

Payment for time lost falls squarely within the ordinary meaning of "remuneration" for "services rendered." 26 U.S.C. § 3231(e). Although the employee is not in *active* service, the employer nonetheless pays his salary because the employee *has* rendered services to the employer. The employer-employee relationship requires the employer to compensate the employee in periods of absence, the same as if he had showed up to work. Whether a payment reflects time lost due to injury compensable under FELA or worker's compensation statutes, or time lost to wrongful discharge under Title VII, the FLSA, or the ADA, or time lost to vacation, or time lost to disability, employees receive such payments only because of their employee status. Such payments are part and parcel of the entire employer-employee relationship; they are remuneration to the employee for entering into the relationship and providing services. BNSF paid respondent $30,000 for lost *wages*, not for lost profits or anything else.

Respondent does not defend the reasoning of the court below. The Eighth Circuit held that § 3231(e) does not "encompass the entire employee-employer relationship generally" and excludes lost wages from compensation because the statute "refers to services that an employee actually renders, not to services that the employee would have rendered but could not." Pet. App. 20a. Respondent, by contrast, believes that "compensation" *does* include payments

that are part of "an employee's package of compensation for rendering services" (Opp. 19) or that "enhance the employer-employee relationship" (Opp. 49). He thus concedes that pay for services rendered "can cover pay a railroad worker receives for time not actively working," including vacation, disability, sick pay, and worker's compensation. Opp. 19-20 & n.9, 24 n.12, 37.

These concessions give away the case. Payments for sickness, disability, and worker's compensation are materially indistinguishable from FELA backpay awards. AAR Br. 10-11. Indeed, states regard FELA and worker's compensation as *substitutes*, "specifically exclud[ing] railroad workers" from worker's compensation statutes because of FELA. *Hilton v. S.C. Pub. Railways Comm'n*, 502 U.S. 197, 202 (1991). Respondent argues that employees receive worker's compensation benefits for "services rendered" because worker's compensation statutes define "employee" to mean someone who "performs services." Opp. 20 n.9. But so does FELA. *Kelley v. S. Pac. Co.*, 419 U.S. 318, 323-24 (1974). FELA protections, like vacation, disability, sick pay, and worker's compensation, are part of the benefits package that railroad employees receive from their employer. FELA requires railroads to provide employees a reasonably safe place to work and guarantees that employees who cannot work because of negligence receive their salary just the same. Confirming that FELA is part of the employment package, Congress prohibits employers from negotiating exceptions to FELA protections in employment contracts. 45 U.S.C. § 55.

Respondent argues that disability, sick pay, and worker's compensation are "compensation," while

FELA backpay is not, because payments for "negligence" or any "breach of legal duty" cannot constitute remuneration for services rendered. Opp. 14, 20-21, 37. But the distinction has no grounding in § 3231(e)'s *text*. The words "negligence" or "breach of legal duty" appear nowhere. Rather, as the term "services rendered" makes plain, the question for purposes of defining "compensation" is why the individual was entitled to the money, not why it was denied. Indeed, on respondent's theory, if an employer fails to send a paycheck, in "breach of its legal duty," and the employee sues for the wages, any damages would not be payment for "services rendered." Or if BNSF had paid respondent disability payments for the absence attributable to his injury, that might have been payment for services rendered, but if a jury ordered disability payments after finding a breach, it is not. None of this makes sense.

FELA payments for lost wages, like payments for severance, vacation, sick leave, or worker's compensation, "are made to employees only." *United States v. Quality Stores, Inc.*, 134 S. Ct. 1395, 1399 (2014). These payments are for services the employee would have, could have, and should have performed but for the employer's largesse or the employer's breach of duty. That is what matters.

For these reasons, this Court unanimously held—in two opinions that should be decisive here—that compensation for "service" to an employer encompasses severance pay and backpay owed for unlawful discharge, i.e., for breach of a legal duty. "Service" does not mean "only work actually done." *Soc. Sec. Bd. v. Nierotko*, 327 U.S. 358, 365-66 (1946); *see Quality Stores*, 134 S. Ct. at 1399-1400.

As Justice Frankfurter explained, "[t]he decisions of this Court leave no doubt that a man's time may, as a matter of law, be in the service of another, though he be inactive." *Nierotko*, 327 U.S. at 370-71 (concurrence). The RRTA uses language virtually identical to the statutes in these cases. Br. 18-20.

Indeed, all of the reasons why severance payments were taxable wages in *Quality Stores* equally support treating FELA backpay as taxable compensation here. *See* 134 S. Ct. at 1400-01. Respondent argues that severance payments "accrue with service time" and are "part of a package of benefits." Opp. 37. But so are backpay and other forms of pay for time lost—the amounts of which are determined by the employee's *salary*.

Respondent calls *Nierotko* "discredited," Opp. 34, but this Court relied on it four years ago in *Quality Stores*, offering additional reasoning "confirm[ing]" the *Nierotko* "principle." 134 S. Ct. at 1400-01. *Quality Stores* alone refutes respondent's effort (Opp. 37) to distinguish backpay and severance. And while *Nierotko* cited the statutory purpose, Opp. 35, its principal focus was the statutory "words." 327 U.S. at 365. Moreover, the statutory purpose here equally supports interpreting compensation to include pay for time lost. The RRTA's purpose is to fund RRA benefits, which indisputably include time lost. S. Rep. No. 79-1710, pt. 2, at 8 (1946) (expressing Congress's purpose to require "corresponding tax collection" for any payment credited as service).

United States v. Cleveland Indians Baseball Co., 532 U.S. 200 (2001), does not "undermine" *Nierotko* (Opp. 35); if anything, it reasserted *Nierotko*'s holding that "backpay for a time in which the employee

was not on the job" nonetheless counts as pay for services, and thus wages. 532 U.S. at 210. *Cleveland Indians* then addressed *Nierotko*'s "secondary" holding crediting backpay for benefit purposes to the time earned. *Id.* at 211, 213-14. Deferring to the government's position, *Cleveland Indians* held that, for taxation purposes, backpay is allocable to the tax period when it was paid. *Id.* at 219-20. The Court noted the general rule of symmetrical construction for tax and benefits purpose—Congress generally sought "conformity ... between the tax and benefits provision"—but concluded that conformity was inessential with respect to the *timing* of the backpay. *Id.* at 215-16. Here, however, conformity is essential for funding the railroad pension system. AAR Br. 20-21; U.S. Br. 21. *Quality Stores* also post-dates *Cleveland Indians*, and *Quality Stores* reaffirmed and extended *Nierotko*'s benefits holding in interpreting the word "services" for taxation purposes, just four years ago. 134 S. Ct. at 1400.[1]

Respondent cites "linguistic differences between FICA and the RRTA." Opp. 38. None are material for these purposes. While the RRTA refers to "money remuneration," Opp. 38, respondent here undisputedly received money remuneration. Respondent notes that the RRTA defines "service" to require "continuing authority" by the employer, Opp. 38, but FICA requires that too. FICA taxes apply to remu-

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[1] Justice Scalia joined in *Quality Stores*' interpretation of "service ... performed," including its 2014 endorsement of *Nierotko*'s application of that phrase to include backpay. That should end any reliance on his earlier offhand statement in his *Cleveland Indians* concurrence about the ordinary meaning of "wages" (Opp. 21, 39).

neration for "service ... performed" by "employee[s]," 26 U.S.C. § 3121(b); employee status refers in turn to the "usual common law rules applicable in determining the employer-employee relationship," *id.* § 3121(d)(2); and those rules require a "right to control and direct," 26 C.F.R. § 31.3121(d)-1(c)(2). Respondent's statement that FICA "includes no similar 'focus on ... authority and control'" (Opp. 38) is thus incorrect. *E.g.*, *Lifetime Siding, Inc. v. United States*, 359 F.2d 657, 660 (2d Cir. 1966).

None of the dictionaries respondent cites (Opp. 17-19) remotely excludes backpay or other compensation for time lost from the terms "services rendered" or "compensation." On the contrary, the dictionaries reflect the broad reach of those terms. Respondent argues that dictionaries define "compensation" to include "loss, privation, *or* services rendered," signaling that "services rendered" cannot include "loss." Opp. 18-19 (emphasis added). Not so. Dictionaries use "or" to convey expansive meaning, not to signify that the connected words lack any overlap. Section 3231(e) defines taxable compensation to include losses so long as they are connected to "services rendered"—including respondent's "past lost wages" but excluding his medical bills, for example. JA94a.

Indeed, on respondent's theory, since *Black's Law Dictionary* defines compensation to include "remuneration or wages," Opp. 18, Congress's use of the term "remuneration" in § 3231(e) must have signaled its intent to exclude all "wages" from taxation. Obviously, it did not.

2. Structure

a. Congress's decision to separately exclude specific forms of pay for time lost from § 3231(e)(1)'s definition of "compensation" confirms that "compensation" reaches pay for time lost generally, including FELA backpay. Section 3231(e)(4) excludes certain kinds of sickness, disability, and worker's compensation payments from taxable "compensation." These exclusions would be utterly superfluous if § 3231(e)(1) already excluded all time lost from taxable compensation. Br. 21-22; U.S. Br. 13, 19-20; *see Quality Stores*, 572 U.S. at 1400 (interpreting FICA "wages" broadly in light of express exclusions). As explained, these types of payments are materially indistinguishable from FELA backpay awards. *Supra* p.3; *cf.* Opp. 19-20.

The 1937 bill confirms that Congress treated sickness and disability payments as a form of payment for time lost—and therefore that § 3231(e)(4) would be superfluous if § 3231(e)(1) excluded time lost. The Senate Report states that the 1937 bill "made clear" that sickness and disability payments constituted taxable compensation, S. Rep. No. 75-818, at 4 (1937)—an obvious reference to the phrase "including remuneration paid for time lost," which appeared in 1937 for the first time. 1937 RRTA § 1(e), 50 Stat. 436. And following enactment of the 1937 statute, the Treasury Department issued a regulation expressly linking all forms of time lost, including sick pay, vacation pay, and backpay for wrongful discharge. Treas. Reg. 100, Art. 6(b) (1937); U.S. Br. 23.

b. The RRTA's companion benefits statute, the RRA, further confirms that pay for time lost is taxa-

ble compensation. Br. 23-27; U.S. Br. 20-23. First, the RRA's use of the word "including" reflects Congress's understanding that "remuneration paid for time lost" is a form of "remuneration paid ... for services rendered." 45 U.S.C. § 231(h). Respondent argues that "including" can sometimes enlarge a phrase, rather than illustrate it. Opp. 24-27. But the very decision respondent cites holds that "enlargement" is the "exceptional sense" of "including," *not* the "ordinary sense," and rejects reading "including" to enlarge rather than illustrate. *Montello Salt Co. v. Utah*, 221 U.S. 452, 466 (1911); *see also Epsilon Elecs., Inc. v. U.S. Dep't of Treasury, Office of Foreign Assets Control*, 857 F.3d 913, 921-22 (D.C. Cir. 2017) (illustration is "ordinary meaning" of including). In normal English, no one says, "I love vegetables, including peaches."[2]

Moreover, the phrase "including ... remuneration paid for time lost" must be illustrative rather than expansive because any other interpretation would render the RRA self-defeating. The RRA defines compensation to mean "remuneration ... for services rendered ..., including remuneration ... for time lost *as an employee*." 45 U.S.C. § 231(h) (emphasis added). An "employee" is an "individual in the *service* of one or more employers for compensation." *Id.* § 231(b) (emphasis added). "Service" has to have a consistent meaning in § 231. If respondent is right and pay for time lost is not pay for rendering service, it would be impossible to receive such payment "as

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[2] Respondent also cites statutes expanding a definition through variations of "The term X includes ...." Opp. 24-27 & nn.13-15. That is not the formulation here.

an employee" under § 231(h), and time lost payments would not be credited for RRA *benefit* purposes—contrary to Congress's manifest intent. Accordingly, pay for time lost must be pay for rendering service.

Respondent next argues that RRA provisions defining "years of service" refer to the years an employee "rendered service ... for compensation or received remuneration for time lost." Opp. 23 (citing 45 U.S.C. § 231(f)(1) and § 231b(i)(2)). But the "second phrase in [a] disjunctive" can be "added simply to make the meaning of the first phrase 'unmistakable.'" *Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246, 253 (1994) (quoting *McNally v. United States*, 483 U.S. 350, 358-59 (1987)). Congress regularly uses "or" to describe overlapping or even basically identical concepts, for avoidance of doubt. *E.g.*, *Schreiber v. Burlington N., Inc.*, 472 U.S. 1, 7-8 (1985) (statute referring to conduct that is "fraudulent, deceptive, or manipulative" does not signal that manipulative conduct excludes fraudulent or deceptive conduct). As noted, the dictionaries respondent cites confirm this standard usage of "or." *Supra* p.7.

c. Stepping back, it is hard to conceive of a better case for symmetrical interpretation than a taxation statute exclusively intended to fund a benefits statute. U.S. Br. 20-21. Respondent offers no reason *why* Congress would treat time lost differently under the RRA and the RRTA, given that "the latter funds the former." *Phillips v. Chi. Cent. & Pac. R.R. Co.*, 853 N.W.2d 636, 649 (Iowa 2014); Br. 25. He asks this Court to ignore the *in pari materia* canon, relying on *Cleveland Indians*' decision (in deference to the government) to allocate backpay awards to different times for SSA and FICA purposes. Opp. 29-

30. But the Court expressly recognized that Congress wanted to ensure "conformity" between the "tax wage base" and the "benefits wage base"—which is the precise conformity at issue here. *Cleveland Indians*, 532 U.S. at 215-16.

Respondent denies that the *in pari materia* canon applies to statutes in different titles, but it does. *E.g.*, *Overstreet v. N. Shore Corp.*, 318 U.S. 125, 126-32 (1943) (reading FLSA in Title 29 *in pari materia* with FELA in Title 45); *see, e.g.*, *Universal Carloading & Distrib. Co. v. Pedrick*, 184 F.2d 64, 65-66 (2d Cir. 1950) (RRTA and RRA are "cognate statutes" and "identical definition" "[o]bviously" should be "identically construed"). As for Congress's consideration in 1946 of a bill that made the RRTA's predecessor a "part of the RRA," Opp. 31, Congress jettisoned that change because it would have necessarily taken the tax collection function out of Treasury, not because Congress opposed conformity. 92 Cong. Rec. 10132, 10160 (July 26, 1946). In any event, unenacted legislation has little if any interpretive value. *Mead Corp. v. Tilley*, 490 U.S. 714, 723 (1989). That principle also disposes of respondent's reliance on an unenacted 1992 bill. Opp. 31.

Contrary to respondent's suggestion (Opp. 18, 46), Congress added a provision crediting wartime military service toward benefit eligibility because the entity to whom such service is rendered (the United States) is not a *railroad* and thus would otherwise be excluded under the RRA's definition of "employer." 45 U.S.C. § 231(a). A special benefit for military employees hardly counsels against reading the RRTA and RRA symmetrically as a general matter. *See Phillips*, 853 N.W.2d at 649 (reading statutes sym-

metrically "absent controlling language to the contrary"). Moreover, Treasury reimburses the Railroad Retirement Board (RRB) for costs associated with accrued RRA benefits for military service. 45 U.S.C. § 231n(a), (b); Schreiber, *The Legislative History of the Railroad Retirement and Railroad Unemployment Insurance Systems* 39 (1978). Congress's provision of alternative funding shows that Congress opposed the sort of unfunded RRA mandate respondent advocates here.

3. History and Purpose

a. The deletion in 1975 and 1983 of references to "time lost" in prior versions of 26 U.S.C. § 3121(e)(1) does not signal congressional intent to exempt time lost from RRTA taxation. *Cf.* Opp. 27-29. Rather, Congress amended the RRTA to conform timing rules for RRTA taxation to timing rules for RRA benefits, as the 1975 amendment's replacement of the word "earned" with "paid" makes plain. U.S. Br. 6 (showing strikeouts), 25-26; Br. 30-34, 7 n.12 & Add. 1a-20a. But Congress still needed to address a *second* reference to "earned"—the one associated with the phrase "including remuneration paid for time lost." U.S. Br. 6. Congress deleted the entire phrase rather than amending it because compensation for "services rendered" on its own readily encompasses compensation for time lost—as *Nierotko* held in 1946 when construing virtually identical language. *Supra* pp.4-5. The deletion eliminated clarifying (but ultimately unnecessary) language. Indeed, Congress simultaneously deleted a clarifying reference to "employee representative" in the same sentence, *see* U.S. Br. 6 (showing strikeouts), even though employee

representatives still receive taxable compensation, 26 U.S.C. § 3211.

Tellingly, respondent cannot settle on a date when he thinks Congress excluded payment for time lost from RRTA compensation. *Compare* Opp. 28 (1983) *with* Opp. 29 (1975). That is because the sequence of the amendments confirms Congress had no such intention. Congress could not have intended to exclude time lost in 1975, because Congress left four express references to "time lost," including for personal injury, in the second paragraph of the very provision it was amending, U.S. Br. 6-7, 28—another fact that respondent makes no effort to explain. Thus, for eight years (between 1975 and 1983) the statute contained instructions on what counted as pay for time lost and how to apportion payments that included time lost for personal injury, unambiguously showing that Congress believed "remuneration ... for services rendered" in the first sentence of 26 U.S.C. § 3231(e) continued to cover time lost for personal injury.

The 1983 amendment did not eliminate time lost from compensation either. The 1983 amendment made no changes to the first sentence of § 3231(e), and could not have altered the definition of "services rendered." Br. 28-29. Indeed, the 1983 amendment was expressly "technical" only, Br. 8, 32; U.S. Br. 9, 28-29, a point respondent ignores.

Respondent argues that the amendments had to have "real and substantial effect" (Opp. 27, 29), but altering timing rules is "real and substantial." And the legislative history confirms that the changes did not eliminate time lost from the meaning of compensation. Both the House and Senate sponsors ex-

plained in 1975 that Congress amended the "method" of assessing taxes, to make the tax and benefits computation "*consistent*." Br. 30-32 (emphasis added). Respondent makes no attempt to square the sponsor statements with his view that the 1975 amendment renders computation of tax and benefits compensation *inconsistent*. Nor does respondent address legislative history indicating that the 1975 amendment would cause only a $10,000 revenue loss, or dispute that that figure is irreconcilable with his interpretation. Br. 31-32.

Respondent's interpretation turns congressional intent on its head. Congress did not abruptly *end* a policy of consistent treatment of RRTA and RRA compensation that had persisted for nearly 40 years in an amendment aimed explicitly at *preserving* consistency. The secondary source on which respondent repeatedly relies (Opp. 2-3, 9) confirms that the amendment was intended solely to alter timing rules. Schreiber at 479.

Finally, after the 1975 amendment, Congress amended § 3231(e) to carve out *certain* specific types of payments for time lost. U.S. Br. 7-8, 14-15; *see supra* p.8. This statutory history strongly signals that the 1975 amendment had not already eliminated the entire "time lost" category.

b. Exempting pay for lost wages from taxable compensation would undermine Congress's goal of creating a self-sustaining retirement system for railroad employees. AAR Br. 20-21. And such an exemption would create an unjustified "windfall" for people like respondent, by "placing injured railroad employees in a better position than they would have been had they not been injured, as they receive the

same retirement benefits as noninjured employees but pay less for those benefits." *Munoz v. Norfolk S. Ry. Co.*, 2018 WL 2728696, at *9 (Ill. App. Ct. June 5, 2018) (dissent). Taxing the lost wages portion of a FELA award (or any other backpay award) restores employees to the position they would have been in absent injury and is therefore perfectly consistent with the "remedial" purposes of the RRA. Relatedly, respondent's invocation of a FELA remedial canon is misplaced. Opp. 40. This case involves the interpretation of the RRTA, not FELA, and respondent's interpretation would exclude all backpay awards from taxation, not just FELA awards. *Cf. Encino Motorcars, LLC v. Navarro*, 138 S. Ct. 1134, 1142 (2018).

Respondent also argues that railroads support treating lost wages as taxable to provide a settlement advantage. His theory is that employees would rather settle for less and collusively categorize the entire sum as non-taxable, rather than risk a verdict where a jury allocation controls taxability. Opp. 40-41; AAJ Br. 30-36; SMART Br. 5-7. "This claim is specious." *Liberatore v. Monongahela Ry. Co.*, 140 A.3d 16, 31 (Pa. Super. Ct. 2016). The "risk" of paying taxes is a risk Congress *intended*; to the extent employees currently engage in sham settlement allocations—*e.g.*, $0 to lost wages—to avoid RRTA taxes, that is not a practice the Court should look to protect.

More generally, not only are the parties' motives irrelevant to the proper interpretation of the statute, there is nothing nefarious about the railroads joining the position the government has taken for 80 years. The government's interpretation provides a bright-line, administrable rule that treats as compensation

all payments made as part of the employer-employee relationship. Very little commends respondent's rule requiring a case-by-case assessment of payments under judgment vs. settlement, tort vs. contract, FELA vs. all other statutes, and so on—with every distinction depleting resources to fund RRA benefits. As for the jury instructions (Opp. 41), the law should drive jury instructions, rather than vice versa.

B. The RRTA Does Not Distinguish Between Judgments and Settlements

As a fallback, respondent argues that "pay for time lost" counts as RRTA "compensation" only if awarded pursuant to a settlement rather than a judgment. Opp. 9-10, 23, 32-34. Respondent cites no text supporting this distinction. The word settlement does not appear in the RRTA. To the contrary, compensation encompasses "*any form* of money remuneration." 26 U.S.C. § 3231(e) (emphasis added). A judgment for backpay is "[s]urely ... remuneration." *Nierotko*, 327 U.S. at 359, 364.

Respondent does not cite a single statute or decision—from any court, anywhere—distinguishing judgment-based awards and settlement-based awards for tax purposes, or any relevant purpose. And he identifies no justification for such a distinction. The fact that settling companies might not "admit liability" (Opp. 33) has no bearing on whether the settlement constitutes "money remuneration." Besides, settlements can be entered in the form of a judgment, and judgments can be subsequently altered through settlement.

As for the Railroad Unemployment Insurance Act's reference to judgments (Opp. 33), that is only because the RUIA *also* refers to settlements. 45

U.S.C. § 362(*o*). Since the RRTA does not refer to settlements but instead covers "any form of money remuneration," Congress had no need to refer specifically to judgments to ensure they were covered.

Respondent repeatedly asserts (Opp. 1, 6, 16, 54-55) that the IRS has never imposed RRTA taxes on FELA judgments. This assertion is not only irrelevant; it is false. In 1980, the IRS instructed an employer to withhold RRTA taxes from damages for lost wages pursuant to a FELA personal injury "jury award." IRS Technical Advice Memorandum 8115012, 1980 WL 137627 (1980). BNSF cited this document in its cert-stage reply (at 6). Moreover, a 1937 Treasury regulation interpreted RRTA "compensation" to include "back pay upon reinstatement after wrongful discharge," Reg. 100, Art. 6(b)—which presupposes a *judgment* finding the discharge wrongful. *See* Opp. 33 (settling parties do not "admit liability"). And the RRB has confirmed that RRTA compensation includes "judgment[s]." RRB, Pay for Time Lost from Regular Railroad Employment 9 (2017).

The Association of American Railroads (AAR) statement preceding the 1946 amendment does not support a settlement/judgment distinction. Opp. 9-10, 32. AAR referred to settlements not because payments in the form of judgments fail to qualify as compensation, but because settlements combining backpay with other items of damages, like pain and suffering, presented a distinct issue of apportionment. AAR Statement at 575-77. The Senate Report thus refers to "*general* settlement[s]" and "*lump-sum* settlement[s]." S. Rep. No. 79-1710 at 7-8 (emphasis added). In verdicts, however, juries can expressly

apportion damages between taxable lost wages and non-taxable pain and suffering or medical expenses—as the jury did here. JA94a. The 1946 amendment addressed the issue by creating a statutory presumption that unapportioned "payments" that included any time lost were taxable in their entirety. Pub. L. 79-572, § 2.

C. The IRS's Interpretation Warrants *Chevron* Deference

As explained above, traditional tools of statutory construction foreclose respondent's position. But, under *Chevron*, any ambiguity should be resolved in favor of the IRS's longstanding interpretation.

The IRS has defined "compensation" to include payments for time lost since the RRTA was enacted in 1937. *See* 26 C.F.R. § 410.5 (1938). A version of this regulation has remained in effect, without interruption, for 80 years. 26 C.F.R. §§ 31.3231(e)-1(a)(3), (4) (2018). The IRS has reiterated this interpretation in other formats as well. Br. 36-37; U.S. Br. 33-34.

Respondent thus moves the goalpost. He argues (Opp. 52, 53) that the current regulations do not address payments for "personal injuries" or "judgments." But the regulations provide that compensation includes "pay for time lost" without qualification—i.e., *any* time lost for *any* reason in *any* form. 26 C.F.R. §§ 31.3231(e)-1(a)(3), (4). The IRS need not specify that it means "time lost" payments pursuant to settlement, and pursuant to judgment, and pursuant to FELA personal-injury awards, and pursuant to Title VII unlawful-discharge awards, and so on. The decision below recognized that "[u]nder this regulation, [respondent's FELA] damages for lost wages fit well within the definition of 'compensa-

tion.'" Pet. App. 19a; *id.* 24a (describing the regulations as "contrary" to respondent's position). The United States agrees. U.S. Br. 33-34; *Auer v. Robbins*, 519 U.S. 452, 462 (1997); *accord Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 155 (2012).

The IRS's interpretation has not been inconsistent, as respondent claims (Opp. 53). Respondent points only to a 1979 regulatory amendment that deleted a 1960 provision concerning the apportionment of personal injury payments that contained both taxable components (e.g., backpay) and nontaxable components (e.g., medical expenses). *Id.* When announcing this change in 1979, the IRS explained that it made the amendment "to conform existing regulations ... to changes made" by a 1976 law. The change had nothing to do with the *1975* statutory amendment to § 3231(e) at issue here.

Indeed, respondent's interpretation of the 1979 regulatory revision conflicts with the contemporaneous statute, which retained references to "pay for time lost" and "personal injury" in § 3231(e)(2), as respondent acknowledges (Opp. 12). Not surprisingly, the IRS reaffirmed in 1980 its view that compensation still includes pay for time lost due to "personal injury." Technical Advice Memorandum, 1980 WL 137627. And again, that 1980 memorandum concerned a judgment, *supra* p.17, refuting respondent's suggestion that the IRS's interpretation deserves no deference because the agency never applied that interpretation to judgments.

II. Section 104(a)(2) Does Not Apply

Alternatively, respondent argues that, even if the RRTA itself defines compensation to include pay for time lost, another provision, 26 U.S.C. § 104(a)(2), ex-

cludes such pay from RRTA taxation. Opp. 42. Relying on the district court's holding, respondent argues that, because § 104(a)(2) excludes personal injury damages from "gross income," respondent's backpay award is likewise excluded from RRTA *employee* taxes that are "imposed on income." Opp. 42-44 (quoting § 3201(a)); Pet. App. 29a-30a. Respondent also maintains (Opp. 43, 48, 51) that, because the RRTA's *employer*-side tax in § 3221 is called an "excise tax" and not a "tax on income," § 104(a)(2) does not affect the employer-side tax. In other words, respondent's theory gerrymanders the RRTA to ensure that employees pay no tax; railroads pay the full tax; and employees receive full credit toward retirement benefits. This argument falters at every step.

1. Starting with the text, § 104(a)(2) does not limit the scope of "income." Instead, § 104(a)(2) limits the scope of "gross income." Gross income is defined as "all income ... [e]xcept as otherwise provided." 26 U.S.C. § 61. The RRTA, however, does not refer anywhere to "gross income"; rather, § 3201 says "income," which is a broader term than "gross income." FELA awards are indisputably "income" under the ordinary meaning of that term.

But it would not matter if RRTA used the term "gross income" (or § 104(a)(2) used the term "income"). The word "income" in § 3201 does not affect, much less limit, the calculation or amount of employee RRTA taxes owed. Rather, the word "income" clarifies only the *type* of tax and who pays it. Likewise, § 3221 calls the employer-side payment an "excise tax," denoting its source. Any other conclusion leads to absurd results. If the RRTA tax were based on "income" or "gross income," the RRTA tax base would sweep in *non-railroad* income, including everything

from dividends to lottery winnings. Employees would thus owe *more* RRTA taxes.

Although an employee pays RRTA tax out of income, the actual amount of RRTA tax due—for both employees and employers alike—is calculated based on employee "compensation." 26 U.S.C. §§ 3201, 3221; *id.* § 6051(e)(1) (RRTA is "tax on compensation"); 45 U.S.C. § 231e(e)(2) (same). Sections 3201 and 3221 identically describe the tax as "the applicable percentage of the compensation [received/paid] during any calendar year by such [employee/employer] for services rendered." 26 U.S.C. §§ 3201, 3221. In other words, *even if* "income" excluded payment for lost time (it does not), respondent's argument would only work if the Court read "compensation" to mean "compensation less exclusions from income" in § 3201, but to just mean "compensation" in § 3221. The RRTA defines "compensation" for all "purposes of this chapter," *id.* § 3231(e); the term cannot have different meanings for employers and employees.

2. Respondent's position would also render the RRTA incoherent for much of its existence. From 1946 to 1975, § 3231(e) defined "compensation" to include remuneration for "absence on account of personal injury." Br. 7 (quoting extant statute). At the same time, like today, the RRTA imposed "upon the *income* of every employee a tax equal to [a percentage] of the compensation." 26 U.S.C. § 1500(a) (1946) (emphasis added). On respondent's theory, however, these provisions contained irreconcilable mandates: "compensation" expressly *included* payment for time lost on account of personal injury, while the reference to "income" *excluded* it. That historical inconsistency is a strong reason to reject respondent's interpretation.

Respondent's position also cannot be right under the current law. The RRTA excludes from "compensation" many of the same income sources that 26 U.S.C. §§ 101-140 exclude from "gross income." *See* 26 U.S.C. § 3231(e). Section 104(a)(2) is notably absent from the RRTA's list, which is reason enough not to import it. Br. 41. And if the word "income" imports all gross income exclusions into the RRTA, then *all* exclusions from "compensation" in § 3231(e) are inexplicably superfluous. Respondent suggests (Opp. 48) that this massive superfluity only extends to employee taxes, since the word "income" does not appear for employers in § 3221. But had Congress wanted RRTA exclusions to apply only to one portion of RRTA taxes, Congress knew how to say so. *See* 26 U.S.C. § 3231(e)(3) (creating a rule "[s]olely for purposes of the taxes imposed by section 3201").

Respondent further argues (Opp. 49) that Congress included the express RRTA exclusions because they are "fringe benefits" that would otherwise constitute pay for "services rendered." But the RRTA also excludes from compensation various funds from *non*-employer sources, including certain "Qualified scholarships," 26 U.S.C. § 3231(e)(5) (referencing § 117), and federal and state student loan forgiveness, *id.* (referencing § 108(f)(4)). Conversely, Congress failed to exclude numerous fringe benefits that the tax code excludes from gross income. *E.g.*, *id.* §§ 125 (cafeteria plans), 129 (dependent care), 137 (adoption assistance). On respondent's theory, all of these items would nonetheless be inexplicably excluded from the employee's tax base, but not the employer's.

3. Respondent argues (Opp. 44-46) that because some lower courts have applied § 104(a)(2) to reduce FICA "wages," this Court should do the same to

RRTA "compensation." Besides the questionable logic of those decisions that "erroneously conflate distinct concepts of 'gross income' under the income-tax provisions and 'wages' under FICA," U.S. Br. 32, there is no textual basis to extend these decisions to the RRTA.

Respondent (Opp. 45) relies on *Rowan Cos. v. United States*, 452 U.S. 247, 254 (1981), which held that the term "wages" excludes meals and lodging for purposes of both (1) wages taxed by FICA under § 3101 and (2) wages withheld for federal income tax under § 3402(a). This case is fundamentally different. *Rowan*'s importation of exclusions from "wages" into a statute taxing "wages" does not support importing such exclusions into a statute taxing "compensation." Wages and compensation are not identical, as the statutory definitions and regulations make clear. 26 C.F.R. § 31.3231(e)-1(a)(1).

If anything, *Rowan* undercuts respondent's interpretation. *Rowan* concluded that Congress would not give the same term ("wages") different meanings in similar contexts. *Rowan* refutes respondent's theory that Congress gave different terms ("gross income" and "compensation") the *same* meaning. *Rowan* also turned on Congress's "interest [in] simplicity and ease of administration." *Envtl. Def. v. Duke Energy Corp.*, 549 U.S. 561, 575 (2007). Reading "compensation" to mean one thing for purposes of RRTA employee-side taxes and another for purposes of employer-side taxes and RRA benefits renders the statutes more complex and less administrable.

Finally, Congress undid *Rowan* by statute, including by adding anti-*Rowan* language to the RRTA. 26 U.S.C. § 3231(e)(1) (providing that income-tax "exclusions from 'wages'" do not "require a similar exclu-

sion from 'compensation'"); *see id.* § 3121(a) (same for FICA). The Court should hardly *extend Rowan*.

4. Any doubt is resolved by the IRS's longstanding position that § 104(a)(2) does not limit the RRTA. Br. 43-44; Technical Advice Memorandum, 1980 WL 137627. Respondent states (Opp. 54) that the agency rulings "pertain to settlements, not FELA judgments," but he does not explain why that distinction makes one iota of difference on whether to import § 104 into the RRTA. *Supra* pp.16-18. Respondent also argues (Opp. 54) that revenue rulings "do not have the force and effect of regulations," but he does not dispute that the rulings evince the kind of longstanding agency interpretation to which this Court defers. *Barnhart v. Walton*, 535 U.S. 212, 222 (2002); *United States v. Mead Corp.*, 533 U.S. 218, 230-31 (2001); *see NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 275 (1974); Br. 43-45. There is no good reason to overturn the IRS's settled view on this issue either.

CONCLUSION

The decision below should be reversed.

Respectfully submitted,

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